United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1415

ORIGINAL

To be argued by
JULIUS WASSERSTEIN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

MARIZA DE LOS SANTOS,

Appellant.

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. MARIZA DE LOS SANTOS, Appellant.	Docket No.: 76-1452

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered September 13, 1976 in the United States District Court for the Southern District of New York (Bonsal, J.) convicting appellant after re-trial of possessing with intent to distribute cocaine in violation of Title 21 U.S.C. §841(a)(1). Appellant was sentenced to two years imprisonment pursuant to §3651 of Title 18 U.S.C., as amended, with provision for her to be confined six months and the remainder of her sentence to be suspended. Upon the expiration of her confinement, appellant was ordered placed on probation for a three year period and was given a three year special parole to run concurrently with the probationary term.

Appellant's sentence has been stayed pending the determination of this appeal.

STATEMENT OF FACTS

On October 21, 1975, appellant, Mariza De [illegible]os Santos, and her co-defendant, Walter Swiderski, proceeded to trial on a two-count indictment charging them with possession with intent to distribute both marijuana and cocaine in violation of Title 21 U.S.C. §841(A)(1). Both defendants were convicted of possessing with intent to distribute cocaine, but said convictions were reversed by this Court on June 11, 1976, and a new trial was ordered. Following a new trial, which commenced on July 20, 1976, both defendants were again found guilty.

GOVERNMENT'S CASE

MARTIN CHARLES DAVIS, 29 years of age and unemployed, testified that in August of 1973, he first came in contact with the Drug Enforcement Administration after he had sold several ounces of marijuana. Initially, Sergeant Egan from the New York City Police Department asked him if he would be willing to co-operate, as they were interested in

purchasing large amounts of narcotics (19-22).* He first asked if he'd be compensated and then replied that he did not want to have anything to do with such a venture because it would be dangerous (22).

Two months later, Special Agents Tom Fekete and Jose Keefe telephoned him and thereafter told him that the Federal Government had more money than the City. When asked if he would be willing to co-operate, Davis told the Agents that he had lost his drug contacts during these past two months and did not know any drug dealers. However, since he had no money, he did agree to co-operate (22-23). Because of his co-operation with the Government, he had received about $16,000 (24).

In November or December of 1973, Davis met Swiderski who immediately told him that he was selling THC, which is similar to hashhish (27-28). Davis tried it and expressed his interest in buying it. According to Davis, Swiderski would come into the City alone on weekdays to see him, but if he came in the evenings or on weekends, he was usually accompanied by appellant (28).

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*Numerical references are to pages of the trial transcript.

On May 31, 1975, pursuant to a message he had received from his phone service, Davis telephoned Swiderski who told him that he wanted to purchase one-quarter pound of cocaine since it was his birthday (29).

Davis reported this incident that night to the police and then invited Swiderski to his room at the Hotel Chelsea (30). Again, at the hotel, Swiderski said it was his birthday and that he wanted to buy one-quarter pound of cocaine. He then took out several thousand dollars to indicate his sincerity about doing business (30). Subsequent to this meeting, he told Agent Fekete what had happened and the Agent told him to stall (31). Accordingly, Davis then contacted Gene Casey, who represented a dealer named Carlton Bush, and made arrangements for the purchase of cocaine (33034). Next, he telephoned Swiderski, who agreed to meet him at the Hotel Chelsea the next day at about 2:00 p.m. (34).

Davis further testified that on June 3rd, Defendant Swiderski and appellant arrived at his hotel where Swiderski showed him the money (30). Swiderski knew that the price of the cocaine would be $4,600 (35). They went downstairs

and picked up someone named Williams, who was in front of the hotel. The four of them got into a van and drove to 46th or 47th Street off Sixth Avenue (46). Bush first signalled to him in a small room and said "Let's do it as fast as possible." (52) Davis in turn signalled the Defendant Swiderski and the three of them stepped into this small room. Swiderski looked at the cocaine first and then asked appellant to come into the room to examine it (36-37). Both Defendant Swiderski and appellant snorted some of the cocaine. Next, Swiderski performed a "burn test." (37) Additionally, Swiderski wanted to perform a third test, a "bleach test." (37) Thereafter, appellant told Defendant Swiderski "I don't think it is good enough for our personal use, but you know the person who wants to buy it will buy it at this price." (38) Bush stated that if they brought the one ounce, he would bring the other three ounces later that evening to finish the deal (38-39). It was further agreed that they would give Bush $1,250 for the one ounce and would return later that night for the remaining three ounces. Defendant Swiderski and Bush talked about dealing in pounds of cocaine weekly and that he wanted another one-half pound of cocaine that week (38). Defendant Swiderski

then put the cocaine into his pocket and they left the apartment (39). Upon returning to the Chelsea Hotel, Davis told Agent Fekete what had happened, and he in turn radiod this information (40). The witness acknowledged that although he knew Swiderski during the period November of 1973 to June of 1975, Swiderski never sold either him or any agent from the DEA any narcotic substances (71).

GERALD LINO, a New York City Police Officer, testified that on June 3, 1975, he was surveilling the area of the Hotel Chelsea, since he had been informed that a narcotics transaction was to be conducted during the course of that day. He and his fellow officer were dressed as undercover agents (102-116). There he observed a van which was parked in front of the Hotel Chelsea. Four people got out of this van and proceeded to West 48th Street. They went into a building, where they stayed about 40 minutes (103). Next, Defendant Swiderski, appellant and Davis left the building and entered the van. At 34th Street and 8th Avenue, the van was stopped and Defendant Swiderski, in an attempt to get away, hit their car a number of times (103-104). From appellant's pocketbook, they seized some white powder

and $3,700 in cash.* They found $529 in cash in Defendant's Swiderski's possession (104-106).

At the close of the Government's case, both counsel for the defendants moved to dismiss the charge on the ground that the evidence was insufficient to establish intent to distribute because of the small quantity of cocaine involved (131). The court denied the motions (132).

DEFENSE

DEFENDANT WALTER SWIDERSKI, 30 years of age, testified that he and appellant, who is his wife, were presently living in Clifton, New Jersey (133).** He stated that he had never been convicted of any crime, and had attended both Rutgers and Farleigh Dickenson College (133). He is presently employed doing painting jobs for the Moore Painting Company. According to this defendant, in May and June of 1973, he helped appellant run her clothing boutique store which was also located in Clifton, New Jersey (134-35).

*FREDERICK MARTORELL testified that he is employed by the Drug Enforcement Administration and his prime function is to analyze drug findings and testify in court regarding his results (14). He explained that the weight of the powder in Government's Exhibit 9 was 21.5 grams. In ounces, it would constitute 3/5 of an ounce (17).

**Appellant and Swiderski were married on 10/25/75.

Defendant Swiderski has known Davis since November of 1973 and first met him at the "Photon" in Greenwich Village (135). He was introduced to Davis in order that he could buy some marijuana (136) and he thereafter saw Davis on about 20 to 25 different occasions. They would meet socially, and Davis would offer to sell him anything from marijuana to cocaine (137). On a few occasions, Davis supplied him with marijuana, which was for his own personal use. Prior to his meeting Davis, he had never before used cocaine (138). Although Davis offered to sell him cocaine, he never purchased any cocaine from him until June 3, 1975 (138).

Swiderski further testified that on his birthday, which is May 31st, Davis telephoned him and said there might be some marijuana vailable (139). Although he thereafter tried this marijuana, he did not want to buy it. Davis then told him that as it was his birthday, he'd give him some cocaine as a gift (140). Davis, after speaking to two other males, told him that there was no cocaine then available, but asked if he would like to try some speed (141). Swiderski declined and insisted that he would not buy it. He likewise denied that he'd asked Davis to get him one-quarter pound of cocaine that day (142). Appellant then called the hotel, since she wanted to be with him on his birthday (142).

On June 3rd, he and appellant were going to attend the National Boutique Show located at the Hotel McAlpin on the corner of 6th Avenue between 33rd and 34th Streets (143). They intended to buy some things wholesale for the boutique, and they also were going to buy some clothing for their own wardrobes (144) According to this defendant, they were planning to take the goods directly from the distributors at the show since by purchasing the clothes with cash, they could save money (146). However, early that morning, Davis telephoned him and told him that he would be able to get some cocaine. Swiderski said okay because he didn't believe him, and then he went back to sleep (148). An hour later, Davis again telephoned and told him to come to the Hotel Chelsea (149). At about 3:00 p.m., both he and appellant went to the Hotel Chelsea, but Davis asked them to take him and another person to a party (150-52). Although appellant stated that they should take a cab, he nevertheless gave them a ride in the van (152). They proceeded to West 48th Street where Davis invited them to come upstairs. It was only after much coaxing that they went up to the apartment (152-53). Davis then called him into a separate room, where he observed a mirror with white powder on it (156). Swiderski first took some of the cocaine and then asked appellant to join him in this room (157). They all snorted some of the cocaine (158). Suddenly, Davis became quite exicted and asked what

he would take. Swiderski asked appellant what he should do, and she replied they should take a gram in order that they would not aggravate anyone in the room (158-59). Davis, however, protested and insisted that they had to take the whole package (159). Swiderski asked Davis how much it would cost for them to leave, and Davis told him $1,250 (160). He asked appellant for the money, which she gave him. According to Swiderski, he was afraid that if they did not produce the money, they would be beaten up (158-160). He gave this money to them (160). Upon his paying the money, someone then dropped the cocaine into appellant's handbag (161). He, appellant, and Davis left the apartment and he drove Davis to the Chelsea Hotel (161). At 8th Avenue and 34th Street, when he stopped for a traffic light, a car shot in front of him (234-35). Two people, pointing guns and dressed in dungarees got out of the car (162-63). He put the car in reverse and attempted to get away. They had no idea that the men were police officers, but as soon as they learned this fact, he stopped (163-64).

He denied ever selling or offering to sell drugs to Davis (165). On June 3, 1975, when he took the cocaine, he had no intention of distributing it to anyone, and paid the

$1,250 only to get out of the room safely (165-66). He has never known appellant to purchase or sell drugs (169). Moreover, any marijuana he ever purchased was only for his personal use (170).

APPELLANT, 26 years of age and a graduate of Marymount Manhattan College, testified that she is presently married to the Defendant Swiderski (197-98). During the period of May and June, 1973, she was the owner of a boutique which specialized in women's fashions (197-98). Presently, she and her husband are self-employed for Moore Painting (199).

Appellant admitted that she had used cocaine a few times when Davis would give it to them for nothing (202). However, she never purchased or sold any narcotics (212).

On June 3rd, she and Walter left their apartment in New Jersey and were going to a boutique show at the McAlpin Hotel. She had several thousand dollars in her possession, which she intended to use to purchase clothes for both herself and the boutique (200.

At about 3:00 p.m. on that day, they first went to the Chelsea Hotel, and Davis told them that they had to go elsewhere for the party (204). They arrived at a building

on West 48th Street, and went into a small apartment (205). After a few minutes had elapsed, Walter called her into the bedroom where she snorted some cocaine that was passed around (206-07). She never participated in any testing of this cocaine (207). Davis kept insisting that they had to take a gram (293). She got frightened and told Walter that they should take a gram so that they could leave (209). A guy said it would cost then $1,250 to leave (210).

REBUTTAL

MICHAEL GAETANA, President of Abacus Imports, testified that in June 1975, he had a show in the Hotel McAlpin. He never received an order from the Isle of Boutique (233), Swiderski or appellant (234).

GABY DRHEIN, saleslady for Abacus Group of America, was at the National Boutique Show in June of 1975 (238). She never received an order from appellant, Swiderski, or Isle of Boutique, nor did she sell her samples at the end of the show for 25% discount (239).

RSNEA DANTE, Fashion Designer for Dante, Limited, testified that he was also at the show (240). He never

had any discussions with the two defendants regarding the purchase of goods (241). Additionally, he never sells his samples (241).

CHARGE

Initially, the court charged the jury on the definition of possession with intent to distribute as follows:

> "Now, turning to what 'possession with intent to distribute' means, well, intent to distribute merely means that you intend at some point or later time to pass on all or some of it; it means you intend to sell it; it means you intend to give it away; you can intend to give it to a friend of yours or somebody who is close to you. If you are going to pass it on, that is to distribute under the statute." (298-99)

During their deliberations, the jury became troubled, and requested a re-definition of "intent to distribute." (320). Specifically, the jury asked: "If both defendants possessed the drug (i.e., one paid for it and it was found in the other's handbag), can intent to distrubute mean one giving the drug to the other or must third parties be involved?" (320)

In response, the Government stated that they had talked to the alternate jurors, and they were confused as to whether "if it was from one person to another it could be possession with intent to distribute." The Government had asserted that such was the case, even though recognizing that this was a unique situation, and thus requested such a charge.

Counsel for Swiderski objected, stating that the Government's theory that the defendants were acting in concert to distribute from one to the other was erroneous, and neither did this constitute intention to distribute.

When the court stated it would repeat its original charge, the Government protested that the jury did not understand the charge as given, to wit: that the transfer of drugs from one to the other is sufficient to satisfy the elements of intention to distribute drugs (321).

Counsel then protested that under the Government's theory, any two people charged with possessing drugs, can also be charged with intent to distribute the same (322).

The court then charged the jury as follows:

"Now, the next one you want to know is a definition of intent to distribute. Now, in my charge I said to you:
Now, turning to what 'possess with intent to distribute' means. What does that mean? Well, intent to distribute merely means that you intend at some point at a later time to pass all or some of it on. It could mean a sale: it could mean that you could give it away. You could give it to a friend of yours or even to your fiancee. If you are going to do that, that is a distribution.
And then (c) clarification of following -- then you put in a question here. I am going to leave it with what I told you distribution means. I think that is your problem to find that ou ." (326)

ARGUMENT
POINT I

THE COURT COMMITTED REVERSIBLE ERROR IN RECHARGING THE JURY THAT IF THEY FOUND THAT THE TWO DEFENDANTS ONLY PASSED THE COCAINE TO ONE ANOTHER, THIS CIRCUMSTANCE WOULD CONSTITUTE SUFFICIENT PROOF THAT THEY INTENDED TO DISTRIBUTE SAID DRUG WITHIN THE MEANING OF TITLE 21 §841(A).

Appellant's conviction was predicated entirely upon the testimony of the paid informant, Martin Davis. Both appellant and her co-defendant raised the defense of entrapment and claimed that they had no intention whatever of distributing the cocaine which had been foisted upon them by Davis and his cohorts. Under these circumstances, since the credibility of the defendants was pitted solely against the credibility of Davis, it was vital that the court accurately charge the jury on the meaning of the statutory term - intent to distribute. It is submitted that in the context of this case, the court committed reversible error in recharging the jury that if they found that the two defendants only passed the cocaine to one another, this circumstance would constitute sufficient proof that they intended to distribute said drug within the meaning of Title 21 §841(A).

Unfortunately, no court has yet passed on the question of whether the passing of a drug between principals alone would constitute sufficient proof of their intention to distribute said drug. Courts have only had occasion to rule that this particular

element was satisfied upon a showing that a third person, other than the defendants, was involved in said exchange. United States v. Hernandez, 480 F.2d 1044 (9th Cir., 1973); United States v. Workapich, 479 F.2d 1143 (5th Cir., 1973); United States v. Frol, 518 F.2d 1134 (8th Cir., 1975); United States v. Hutchinson, 488 F.2d 484 (8th Cir., 1973). Hence, it is now incumbent upon this Court to resolve this critical question. It is therefore urged that upon the analysis of the facts that this Court will decide that implicit in the terms of the statute itself is the requirement that the principals must intend to distribute the drug to some third party.

The court below initially gave the standard instruction regarding the definition of intent to distribute. However, because of the unusual fact pattern, the jury was obviously troubled and in the midst of their deliberations, specifically asked whether the term intent to distribute could mean that one person simply gave the drug to the other (320). While the Government at this juncture acknowledged the uniqueness of the present fact pattern, nevertheless, the Government, over counsel's vigorous protests, requested the court to answer the jury's questions affirmatively (321). Even when the court responded that it would adhere to its original charge, the Government insisted that the jury did not understand that charge and again requested that the court instruct the jury that the

transfer of drugs between principals was sufficient to satisfy that particular element of the crime (321). In finally complying with the Government's request, the court in its recharge effectively destroyed any chance that appellant had of being acquitted.

Clearly, Congress in its enactment of the present statute and its inclusion of the term intent to distribute was concerned primarily with deterring the trafficking of drugs and not the purchase alone of drugs by the principals for their own personal consumption. Any other interpretation would expose an entire class of users to criminal liability, a result certainly not anticipated by Congress.

This case presents a prime illustration of the gross inequities which inured to the defendants upon the court's acceptance of the aforementioned interpretation. In no uncertain terms, the court here re-charged the jury that if they found that appellant and her co-defendant transferred the cocaine to one another, the element of the crime, intent to distribute, would be satisfied. Since the two defendants were charged as principals with purchasing the drugs, they both had an equal right to the possession of said drugs. They should not be held

to a further liability merely because they each jointly possessed the cocaine at different intervals. The fact that an exchange of drugs took place between two principals alone does not mean that these principals had any intention to transfer or distribute the drug to any other person. Moreover, to charge as the court did in this case had the effect of negating the defendants' entire defense. Both claimed that they had been entrapped into purchasing the drugs and further, that they had never evinced any predisposition to distribute drugs of any nature. While they frankly admitted using said drugs, they vehemently denied ever selling or intending to sell or to distrubute any type of drug. They also claimed that said cocaine would be for their own personal use. The court's recharge that an exchange of the drug between these two principals constituted an intent to distribute, undermined this entire defense and automatically insured the ensuing verdicts of guilty.

Consquently, it is appellant's position that this Court should not sanction the charge which was given in this case, and should therefore again reverse appellant's conviction and order a new trial.

POINT II

PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEF FOR THE CO-DEFENDANT SWIDERSKI ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

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November, 1976.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, - against - MARIZA DE LOS SANTOS, Appellant	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 22nd *day of* November *19* 76 *at* 1 St. Andrews Plaza N.Y.C.

deponent served the annexed brief *upon*

Robert B. Fiske

the attorney *in this action by delivering* 1 *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 22nd
day of November *19* 76

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E Thomas

Print name beneath signature

KEVIN E. THOMAS